Supreme Court, U.S.
FILED
JAN 17 1991
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Dakota Cheese, Inc. and James Dee,
Petitioners,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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1991 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

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The government, through its brief in opposition, fails to address squarely the important legal issues raised by petitioners. Rather, the government continues to rely on long recitations of the trial evidence showing that petitioners attempted to conceal their use of calcium caseinate. This evidence has no relevance to the legal issues raised by petitioners, particularly the issue of whether petitioners received a fair trial.

I.

THE COURT DID NOT ALLOW THE JURY TO MAKE A FACTUAL DETERMINATION AS TO EACH AND EVERY ELEMENT OF THE OFFENSE CHARGED

The government argues that the district court did not really direct a verdict against petitioners in this case because the court "merely construed the pertinent FDA regulations and left it to the jury to decide whether petitioners had complied with those regulations." Opp. at 7 n.5. That argument, however, is demonstrably specious; the trial court actually filled the jury's role as factfinder as to *the* crucial factual determination in the case.

The regulations at issue do not expressly prohibit the use of calcium caseinate. Rather, as the government itself recites (Opp. at 8), the regulations prohibit the use of any ingredient not "specified in this section." 21 C.F.R. § 133.156(a). Petitioners contended at trial that, as a factual matter, their addition of non-fat dry milk and calcium caseinate was the scientific, factual equivalent of adding skim milk, which the regulations expressly permit. 21 C.F.R. § 133.156(c)(1). The government argued to the contrary: that, as a factual matter, it was not the scientific, factual equivalent. Both sides elicited extensive testimony, including expert testimony, to prove their contentions on this factual issue. *See* Pet. at 24-26.[1]

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[1]Surprised by the district court's judicial largess in resolving the factual dispute in its favor, the government now pretends that no factual controversy existed. The government now maintains, in hindsight, that it put on extensive factual evidence relating to the issue of whether the regulations allowed the use of calcium caseinate only to establish petitioners' wrongful intent. This convenient claim is belied by the trial record. First, the government sought to establish petitioners' alleged wrongful intent by putting on volumes of evidence concerning petitioners' concealment of their use of calcium caseinate. Second, the government explicitly stated several times during the course of the trial that it believed that the status of calcium caseinate under the regulations was a factual issue. *See* Pet. at 8-11.

The dictrict court should have instructed the jury with the text of the relevant regulations. The jury then could have weighed the voluminous factual testimony and decided whether or not calcium caseinate fell within the regulations' ambit. Instead, the district court directed the jury that the regulations prohibit the use of calcium caseinate. By so "construing" the regulations, the jury was left to decide only the "factual" question of whether petitioners had intentionally added calcium caseinate to their cheese; a "fact" that they had admitted throughout trial. The district court took the trial's most hotly disputed factual issue from the jury, and thus directed a verdict against petitioners.

The government attempts to distinguish two conflicting court of appeals decisions, *United States v. White Horse*, 807 F.2d 1426 (8th Cir. 1986) and *United States v. Johnson*, 718 F.2d 1317 (5th Cir. 1983), on the grounds that those cases involved the question of whether a court can determine that "certain evidence satisfied a statutory element of the offense." Opp. at 7 n.5. This "distinction" not only fails, but in fact highlights the relevance of those conflicting decisions. Determining that certain evidence satisfied a statutory element of the offense is exactly what the district court did in this case.

A central element of each crime charged in the indictment was "falsity." Each crime required a showing that petitioners falsely represented that they were selling low moisture part-skim mozzarella cheese, as defined in the regulations, when they sold the government cheese containing calcium caseinate. If the regulations permitted the use of calcium caseinate, because, as petitioners' evidence showed at trial, it (combined, as it was, with non-fat dry milk) was the factual equivalent of adding skim milk, then no crime occurred because petitioners' representations were not false.

The government also tries to minimize the aberrant nature of the court of appeals' decision in this case by pointing out that *White Horse* is also an Eighth Circuit decision. However, the court in *Johnson,* a decision from the Fifth Circuit, explicitly noted the sharp division among courts on the question of what is properly a factual question for the jury. The *Johnson* court stated:

> Other intermediate appellate decisions do not, of course, speak with one voice. Some decisions support the conclusion we now reach [that whether a gold certificate is a "security" is a factual issue for the jury]. Others support the contrary position. Discord in the precedents provides all the more reason to look to principle. And the fundamental and "elementary" principles involved in this case are that the government must prove every element of the crime beyond a reasonable doubt and that, in criminal cases, the court simply may not direct a verdict on any issue.

718 F.2d at 1323 (footnotes and citations omitted).

Here, the government was simply not put to its proof on every element of the offenses charged. This Court should provide guidance as to which issues are properly resolved by the jury in a criminal trial.

II.

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT NOT TO DECLARE A MISTRIAL WHEN IT REVERSED ITS RULING ON WHICH PETITIONERS HAD RELIED IN PRESENTING THEIR CASE TO THE JURY

In its opposition brief, the government finally recognizes that the district court did completely reverse its previous and repeated rulings when it instructed the jury that, as a

matter of law, calcium caseinate does not fit the regulation's definition of permitted ingredients. Opp. at 7. The government contends, though, that this error was harmless because the evidence that petitioners submitted concerning the propriety of using calcium caseinate also bore on the issue of intent. The Eighth Circuit was seduced by this argument and also used it to explain away the district court's error.

This facile explanation simply does not address the prejudice suffered by petitioners. Relying on the court's ruling, petitioners told the jury in opening statements that the evidence would establish their innocence by showing that they had *fully complied* with the pertinent regulations by using only ingredients which fit the definitions. Significantly, their principal theory of the case was that it was *proper* to add calcium caseinate to the cheese, not merely that they had no intent to defraud because they were unaware that it was improper to add the calcium caseinate. They hammered this point home throughout the case, examining almost every defense witness, both lay and expert, on the issue of whether calcium caseinate was an acceptable ingredient in low moisture part-skim mozzarella as defined in the standards of identity. *E.g.*, TR 1113-1116, 1493-94, 1681. All government expert witnesses were extensively cross examined on this point as well. *E.g.*, TR 882, 918, 1003, 1045, 2044. Then, at the end of the trial, with this factual issue having been the centerpiece of petitioners' defense, the trial judge reversed his previous ruling and directed the jury that petitioners' theory was wrong, as a matter of law. The government attempts to gloss over this devastating reversal with the observation that because petitioners' ensuing proof also had some relation to intent, petitioners suffered no irreparable harm in the eyes of the jury.

Such a position completely ignores the realities of trial. Criminal defendants do not haphazardly present all of the relevant evidence to the jury, then argue about its meaning at a later time. Defendants plan their case, and submit their evidence, based on the factual disputes which will be submitted to the jury. Cross-examination is also conducted with an eye toward the issues which the jury will decide. Every trial lawyer knows how important it is to have a credible "theory of the case" when opening before a jury, laying out the puzzle into which the pieces of evidence will fit, and then to fit those pieces in through the presentation of evidence.

The government cavalierly passes over this issue by arguing that a court may change a ruling that it believes is in error. Petitioners agree. Assuming, *arguendo*, that the issue was properly one of law, the court should have changed its ruling. However, it should also have declared a mistrial, and allowed petitioners to present their case to the jury based on the court's actual ruling, not on a ruling that would later be revoked. Here, the court corrected its error at the expense of petitioners' right to a fair trial conducted with due process of law.

The court of appeals (and the government's) unwillingness to acknowledge the severity of the prejudice suffered by petitioners here is itself disturbing. If allowed to stand, this case establishes that criminal defendants have no reliable right to frame their defense theories according to the court's rulings, and to present their case accordingly, as long as all the relevant evidence is somehow brought before the jury. This is repugnant to long settled notions of fair trial and truly effective assistance of counsel. This Court should grant the writ, and provide guidance as to the importance

of a criminal defendant's right cogently to present his evidence to the jury.

III.

THESE REGULATIONS CANNOT SUPPORT CRIMINAL LIABILITY

The government asserts that the "plain terms" of the regulations foreclose petitioners' argument that the regulations are too vague to support a criminal conviction. Petitioners do not wish to repeat the various interpretations that different experts have applied to these regulations. *See* Pet. at 24-26. Suffice it to say that even a casual perusal of the regulations shows that their terms are anything but plain and that the conflicting testimony of the experts proves the point.

The government sums up its simplistic version of the regulations by stating that an ordinary person who orders a glass of skim milk would not expect to receive a glass of powdered calcium caseinate. A colorful analogy, but a disingenuous one. A truer analogy for purposes of these regulations would be to a person asking what ingredients are in that glass of "skim milk." The FDA's response would be that a variety of things, including "milk derived ingredients" may be present, 21 C.F.D. § 131.143(c)(2), and calcium caseinate (milk protein) is a "milk derived ingredient." That skim milk, or a dairy product such as cheese, contains milk protein, would then surprise no one.

Conclusion

Petitioners have been denied due process and a fair trial, and the rulings of the courts below make it very probable that others will suffer a similar fate. This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: January 15, 1991